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| 101ST CONGRESS *2d Session* | SENATE | REPORT 101-448 |
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# NEGOTIATED RATES EQUITY ACT OF 1990

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

## REPORT

OF THE

## SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

## S. 2933

AUGUST 30, 1990.—Ordered to be printed

Filed under authority of the order of the Senate of August 2 (legislative day, July 10), 1990

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**Calendar No. 802**

101ST CONGRESS
*2d Session*

SENATE

REPORT
101-448

# NEGOTIATED RATES EQUITY ACT OF 1990

AUGUST 30, 1990.—Ordered to be printed

Filed under authority of the order of the Senate of August 2 (legislative day, July 16), 1990

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

## REPORT

[To accompany S. 2933]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 2933) to amend title 49, United States Code, regarding the collection of overpayments of undercharges on shipments via motor common carriers of property and nonhousehold goods freight forwarders, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

### PURPOSE OF THE BILL

The bill, as reported, would give the Interstate Commerce Commission (ICC) authority to review cases where tariff rates or charges are sought to be collected in addition to those originally billed and collected by a common carrier of property or nonhousehold goods freight forwarder providing transportation. The bill would allow motor carriers and shippers to resolve overcharge and undercharge claims by mutual consent when the parties agree that there has been a billing or ministerial error. The legislation also would gradually reduce the deadline for filing undercharge or overcharge claims to 18 months. Additionally, the bill would grant States limited authority to waive application of the Commercial Motor Vehicle Safety Act of 1986 (CMVSA) with respect to vehicles used to transport farm supplies from retail dealers to or from a farm and to vehicles used for custom harvesting operations.

## Background and Needs

### NEGOTIATED RATES

In the advent of partial motor carrier deregulation under the Motor Carrier Act of 1980, shippers and carriers with increasing frequency negotiated rates to meet their needs. In many cases, however, tariffs were not filed with the ICC to reflect these new negotiated rates. This non-filing occurred despite the fact that the Motor Carrier Act of 1980 continued a pre-existing requirement under the Interstate Commerce Act (Act) that motor common carriers file tariff rates with the ICC and that these tariffs would be applicable to all shippers seeking similar transportation movements. Under these requirements, carriers are charged with filing rates with the ICC, while shippers have a corollary responsibility to adhere to the rates on file. In some cases, the carriers made no effort to file new tariffs reflecting negotiated rates, and, in other cases, tariff filings were deemed invalid for technical reasons.

Negotiated rates become a major problem in the last few years as a number of major carriers filed for bankruptcy. In an effort to maximize the assets of these carriers, bankruptcy trustees contracted with auditors who examined carrier records in comparison with tariff rates on file with the ICC. This examination resulted in efforts to collect the difference between the tariff rates on file with the ICC and the lower rates that were actually negotiated, billed, and paid. In many of these cases, shippers were presented with "undercharge" claims reflecting this difference many years after the actual transportation was provided and payment rendered in accordance with the negotiated price. As might be expected, shippers were quite concerned when these third-party collection efforts began.

In an effort to address the growing controversy, the ICC in 1986 adopted a policy statement, "Negotiated Rates I," designed to address the practice of carrier failure to file negotiated rates, and began to consider a shipper's equitable defenses to an undercharge claim. Essentially, the ICC decided to find in favor of the shipper in cases where there was good-faith reliance on a negotiated rate. To clarify its policy, in 1989 the ICC issued a second statement on the issue "Negotiated Rates II." That statement reaffirmed that the ICC's source of authority for its negotiated rates policy was the statutory requirement under 49 U.S.C. 10701 that a carrier's practices be reasonable. Overall, the ICC held that to allow rebilling and subsequent collection based on a higher tariff rate on file would be deemed to constitute an "unreasonable practice", rendering most collection efforts invalid.

Bankruptcy and Federal courts were divided in their interpretations as to whether the ICC had the authority to allow the use of equitable defenses and make findings of an unreasonable practice in undercharge claim cases. Five of six U.S. Circuit Courts which reviewed this matter ruled to uphold the ICC's authority.

### SUPREME COURT DECISION

In *Maislin Industries* v. *Primary Steel,* decided June 21, 1990, the U.S. Supreme Court overturned a policy of the ICC which relieved

a shipper of the obligation to pay the rate on file when the shipper and carrier had negotiated privately a lower, but unfiled rate. The Court held that the ICC's policy was inconsistent with the Act. Similarly, the Court concluded that the Act did not permit the ICC to allow shippers to assert an equitable or unreasonable practice defense to carrier claims for payment by shippers of higher, filed rates even in cases where a carrier's own failure to file a negotiated rate resulted in the subsequent claim for payment at the higher, filed rate.

Shippers strongly object to the *Maislin* decision, and the trucking industry has concerns as well. Bankruptcy trustees and collection agents support the Supreme Court decision. It is estimated that as much as $200 million in undercharge claims may be at issue in light of *Maislin*.

The Committee believes that the result of the *Maislin* decision will be inequitable since the carrier had the initial obligation to file, and that same carrier or the estate of the carrier could profit from the failure to file the negotiated rate. There were also Justices who thought the *Maislin* decision was inequitable. Justice Stevens, in filing a dissenting opinion in which Chief Justice Rehnquist joined, wrote: "There is no evidence of discrimination in this record; nor is there any reason to believe that any shipper or any competing motor carrier was harmed by the negotiated rate or by the failure to file it. The only consequence of today's misguided decision is to produce a bonanza for the bankruptcy bar."

## Legislative History

On July 27, 1990, Senator Exon introduced S. 2933, the Negotiated Rates Equity Act of 1990. Cosponsors of the bill are Senators Kasten and Burns.

The Surface Transportation Subcommittee held a hearing on July 17, 1990, on the negotiated rates issue. During this hearing the subcommittee heard from the Chairman of the ICC, representatives of the shipping community, transportation brokers and freight consultants, carriers, and a representative of bankruptcy trustees.

On July 31, 1990, the Committee met in open executive session to consider S. 2933. S. 2933 was ordered reported favorably.

## Summary of Major Provisions

As reported, S. 2933 would:

1. provide the ICC with authority to review cases where tariff rates or charges are sought to be collected in addition to those originally billed and collected by a common carrier of property or nonhousehold goods freight forwarder providing transportation when it finds: (a) a person has negotiated with the carrier transportation rates other than those legally on file with the ICC for that shipment; (b) the person tendered freight to the carrier in reasonable reliance upon the negotiated transportation rates; (c) the carrier failed to file with the ICC the tariff providing for such transportation rates; (d) the negotiated transportation rates were billed and collected by the carri-

ers; and (e) the carrier demands additional payment of higher rates filed in tariffs;

2. require that a civil action brought to collect tariff rates or charges in addition to those originally billed and collected, be stayed pending a reasonableness determination by the ICC;

3. set a 2-year statute of limitations for the filing of undercharge or overcharge claims which, for transportation or service occurring after 1 year following enactment, would be reduced to 18 months;

4. allow motor carriers and shippers to resolve overcharge and undercharge claims by mutual consent when the parties agree that there has been either a billing error or a ministerial error in establishing the tariff, or that it would be unreasonable to charge the filed rate retroactively, and provide that the parties would be excused from the requirements to charge and pay only the filed rate;

5. apply the ICC's reasonableness authority to all claims based on negotiated but unfiled rates that are filed on, or are pending on, the date of enactment of the bill and to claims arising from transportation shipments tendered up to 18 months after the date of enactment, but not apply it to shipments after 18 months after the date of enactment, unless Congress determines there is a continuing need and enacts additional legislation;

6. require the ICC to submit a report to Congress 1 year after the date of enactment of the bill on whether there exists a justification for continuing this ICC reasonableness authority as it relates to negotiated but unfiled rates; and

7. grant States the authority to waive commercial drivers' license (CDL) requirements with respect to vehicles used to transport farm supplies from retail dealers to or from a farm and to vehicles used for custom harvesting operations.

## ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
*Washington, DC, August 15, 1990.*

Hon. ERNEST F. HOLLINGS,
*Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 2933, the Negotiated Rates Equity Act of 1990, as ordered reported by the Senate Committee on Commerce, Science, and Transportation, July 31, 1990. CBO expects that enactment of this legislation would result in costs to the federal government of about $100,000, mostly in fiscal year 1991. We estimate that no costs would be incurred by state or local governments as a result of this bill.

S. 2933 would clarify the authority of the Interstate Commerce Commission (ICC) in cases where carriers seek to recover charges in addition to those originally billed and collected. The bill would give the ICC the authority to bar additional charges when a shipper paid a negotiated transportation rate lower than the applicable rate on file with the commission. This authority would extend to all pending claims and to claims arising from shipments tendered within 18 months after enactment. In addition, S. 2933 would reduce the time limit for filing undercharge and overcharge claims and would direct the ICC to implement procedures for resolving claims resulting from inadvertent errors.

Based on information provided by the ICC, we estimate that the commission would incur additional costs of about $100,000 in the first year following enactment of S. 2933. These costs would result primarily from additional rulemaking activities and from processing the backlog of proceedings affected by the bill.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Marjorie Miller, who can be reached at 226-2860.

Sincerely,

ROBERT D. REISCHAUER, *Director.*

## REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation as reported.

### NUMBER OF PERSONS COVERED

The legislation would apply to regulated motor carriers and to shippers who use these motor carriers to transport their goods. According to the ICC, there were 44,557 ICC-authorized motor carriers as of August 8, 1990. The ICC estimated the number of shippers—defined as separate establishments—served by these carriers to be between five and six million.

With respect to affected proceedings the ICC Chairman, in testimony before the Committee, indicated that the ICC had 105 claims pending before it as of June 28, 1990, with, at most, 20 of these involving issues other than unreasonable practices. The ICC suggested that these 85 cases represent only a fraction of the potential negotiated rates claims that could be brought. As of August 8, 1990, the ICC indicated that 10 additional negotiated rates proceedings have been filed.

Section 6 of the bill applies to vehicles used to transport farm supplies from retail dealers to or from a farm and to vehicles used for custom harvesting. The U.S. Custom Harvesters, Inc., an association representing custom harvesters, estimates the number of custom harvesters in the United States to be between 2,500 and 3,000. The U.S. Custom Harvesters further indicates that each custom harvester owns and/or uses approximately six vehicles.

Industry estimates that there are over 10,000 small farm retail outlets throughout the country which transport farm supplies directly to the farm or which operate highly specialized, limited use vehicles, driven seasonally for short distances in rural areas and

not on a for-hire basis. It is estimated that these small businesses serving agricultural producers hire between 5 and 15 part-time employees, depending on the weather, the size of the retail outlet's marketing area, the length of the planting season, and the planting needs of farmers in that area.

### ECONOMIC IMPACT

The legislation does not authorize any additional funding. However, the trade press and several witnesses testifying before the Committee have estimated that the whole universe of negotiated rates claims could total $200 million. Assuming the $200 million estimate is accurate, these costs may have to be paid by shippers to carriers and the estates of carriers in the absence of this legislation.

### PRIVACY

This legislation would not have any adverse impact on the personal privacy of the individuals affected.

### PAPERWORK

The Committee does not see a significant increase in the current level of paperwork as a result of this legislation. However, the Committee does anticiapte that there may be an increase in the number of negotiated rates claims brought to the ICC during the 24-month period following the enactment of the legislation.

Section 4 of the bill would allow carriers and shippers to resolve overcharge and undercharge claims by mutual consent when it is agreed that a billing error or ministerial error has occurred. This section, as well as section 6, which grants States the authority to waive CDL requirements for vehicles used to transport farm supplies from retail dealers to or from a farm for custom harvesting, may lead to a decrease in paperwork.

## SECTION-BY-SECTION ANALYSIS

### SECTION 1.—SHORT TITLE

This bill may be cited as the "Negotiated Rates Equity Act of 1990."

### SECTION 2.—PROCEDURE FOR GRANTING RELIEF FOR NEGOTIATED TRANSPORTATION RATES

This section amends section 11705(b) of title 49, U.S.C., to provide that where tariff rates or charges are sought to be collected in addition to those originally billed and collected by a common carrier providing transportation, or by a nonhousehold goods freight forwarder, the ICC may find the collection of such additional tariff rates an charges to be an unreasonable practice in violation of section 10701, except as to household goods motor carriers. The ICC may exercise this authority only in circumstances where it finds: (1) a person has been offered negotiated transportation rates with the carrier other than those legally on file with the ICC for that shipment; (2) the person tendered freight to the carrier in reasonable reliance upon the negotiated transportation rates; (3) the carri-

er failed to file with the ICC the tariff providing for such transportation rates; (4) the negotiated transportation rates were billed and collected by the carrier; and (5) the carrier demands additional payment of higher rates filed in tariffs.

This section also requires that where a civil acation is brought to collect tariff rates or charges in addition to those originally billed and collected, the reasonableness of these practices must be referred to and determined by the ICC under its primary jurisdiction, and the civil action must be stayed pending the determination.

SECTION 3.—STATUTE OF LIMITATIONS

This section amends section 11706(a) of title 49, U.S.C., by providing that a common carrier providing transportation or service must begin, within 24 months after the claim accrues, a civil action to recover charges for transportation or service occurring in the first year after the enactment of this provision, and that, for transportation or service taking place on or after 1 year from such date of enactment, such civil actions must be filed within 18 months after the claim accrues.

This section also amends section 11706(b) by providing that a person must begin, within 24 months after the claim accrues, a civil action to recover overcharges from a carrier for transportation or service, taking place in the first year after the enactment of this provision, and that, for transportation or service taking place on or after 1 year from such date of enactment, such civil actions must be filed within 18 months after the claim accrues.

SECTION 4.—TARIFF RECONCILIATION RULES AND MOTOR COMMON CARRIERS OF PROPERTY

This section amends Chapter 117 of title 49, U.S.C., by adding a new section 11712 subsection (a) of new section 11712 provides that, subject to ICC review and approval, motor carriers and shippers may resolve, by mutual consent, overcharge and undercharge claims resulting from billing errors or incorrect tariff provisions arising from the inadvertent failure to properly and timely file and maintain agreed-upon rates, rules, or classifications in compliance with sections 10761 and 10762. New subsection (a) also provides that resolution of these claims shall not be subject to the penalties of sections 11901, 11902, 11903, 11904, or 11914. New subsection (b) provides that nothing in this section relieves a motor carrier of the duty to file and adhere to its rates, rules, and classifications as required in sections 10761 and 10762, except those related to ministerial errors mutually resolved as described in subsection (a). New subsection (c) also requires the ICC to institute a proceeding within 90 days after the enactment of this section, establishing rules by which the tariff requirements of sections 10761 and 10762 would not apply in instances described in subsection (a) of this section.

SECTION 5.—EFFECTIVE DATE; APPLICABILITY

This section provides that except as stated in subsection (b), the provisions of this legislation (including amendments to current law made by this legislation) shall take effect on the date of the enactment of the legislation. Subsection (b) extends authority to the ICC

under section 2 for all claims filed on, or pending as of, the date of enactment of this bill and to claims arising from transportation shipments tendered up to 18 months after the date of enactment. Subsection (b) provides that section 2 is inapplicable to shipments tendered 18 months or more after the date of enactment unless Congress determines that there is a continuing need and enacts additional legislation. This section also requires the ICC to submit a report to Congress, within one year of the date of enactment, on whether there is justification for continuing section 2 of this bill.

SECTION 6.—AGRICULTURAL WAIVER

This section amends the CMVSA to give States the authority, in addition to the authority which the Department of Transportation (DOT) granted to States to waive application of the CMVSA to most farm vehicles, to vehicles used to transport farm supplies from retail dealers to or from a farm, and to vehicles used for custom harvesting, whether or not such vehicles are controlled and operated by a farmer.

For the purposes of this section, a custom harvester is defined as a person engaged in harvesting for hire, and who may, in this regard, work in different locations for the sole purpose of harvesting and transporting perishable crops to initial storage or market.

In September 1988, DOT used its powers under the CMVSA to give States the authority to waive CDL requirements for farm vehicles. The States may waive CDL requirements regarding the driver of any farm vehicle which is: (1) used to transport either agricultural products, farm machinery, farm supplies, or all to or from a farm; (2) not used in the operations of a common or contract motor carrier; (3) used within 150 miles of the farm; and, (4) controlled and operated by a farmer.

The Committee recognizes that most seasonal agricultural shipments are transported by local, small farm retail outlet employees rather than by farmers. However, because vehicles carrying farm supplies routinely carry hazardous materials that can be explosive or poisonous, the Committee wants this statutory provision to be read very narrowly. Also the Committe does not want to exempt commercial drivers who are delivering produce to distant markets from the CDL's prohibitions against holding multiple licenses and requirements that the driver actually be tested in the type of vehicle being operated.

While the vehicle does not have to be owned and operated by a farmer, to the extent that CDL requirements apply, they cannot be waived under this provision unless the driver is involved exclusively in transporting farm supplies from retail dealers to or from a farm or operates a vehicle used for custom harvesting. The Committee also believes that any waiver should take into account the limitations provided in the existing farmer waiver (e.g., no waiver for the driver if the vehicle is used during the year for common or contract motor carrier operations or if the vehicle is used more than 150 miles from its base of operation).

## CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman).

## CHAPTER 117 OF TITLE 49, UNITED STATES CODE

Section 11705 of That Chapter

**§ 11705. Rights and remedies of persons injured by certain carriers**

(a) * * *

(b)(1) A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title or a freight forwarder is liable to a person for amounts charged that exceed the applicable rate for transportation or service contained in a tariff filed under subchapter IV of chapter 107 of this title or the applicable freight forwarder rate, as the case may be.

(2) A common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this subtitle.

(3) A common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II or IV of chapter 105 of this title or a freight forwarder is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle.

*(4)(A) Except as to household goods motor carriers, where tariff rates or charges are sought to be collected in addition to those originally billed and collected by a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title, or by a nonhousehold goods freight forwarder, the Commission may find the collection of such additional tariff rates and charges, or the imposition of tariff rules, or classifications relating thereto, to be an unreasonable practice in violation of section 10701. The Commission may exercise this authority only in circumstances where it finds that (i) a person has been offered negotiated transportation rates with the carrier other than those legally on file with the Commission for the shipment; (ii) the person tendered freight to the carrier in reasonable reliance upon the negotiated transportation rates; (iii) the carrier failed to file with the Commission the tariff providing for such transportation rates; (iv) the negotiated transportation rates were billed and collected by the carrier; and (v) the carrier demands additional payment of higher rates filed in tariffs. In instances where a civil action is brought to collect tariff rates or charges in addition to those originally billed and collected, the reasonableness of such practices shall be referred to and be determined by the Commission under its primary jurisdiction, the action shall be stayed pending that determi-*

*nation, and relief may be granted as provided under paragraph (3) of this subsection.*

*(B) Nothing in this subsection shall relieve the motor carrier of the duty to file and adhere to its rates, rules, and classifications as required in sections 10761 and 10762, but relief may be granted as authorized in subsection (a) of this section.*

(c) through (d) * * *

Section 11706 of That Chapter

**§ 11706. Limitation on actions by and against common carriers**

(a) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title or a freight forwarder must begin a civil action to recover charges for transportation or service provided by the carrier or freight forwarder within 3 years after the claim accures[.]; *except that a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title—*

*(1) must begin, within 24 months after the claim accrues, a civil action to recover charges for such transportation or service if such transportation or service is provided by the carrier on or after the date of enactment of this exception and before the date that is 1 year after such date of enactment; and*

*(2) must begin such a civil action within 18 months after the claim accrues if such transportation or service is provided by the carrier on or after the date that is 1 year after such date of enactment.*

(b) A person must begin a civil action to recover overcharges under section 11705(b)(1) of this title within 3 years after the claim accrues[.]; *except that a person must begin within 24 months after the claim accrues a civil action to recover overcharges from a carrier subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title for transportation or service taking place on or after the date of the enactment of this exception and before the date that is 1 year after such date of enactment, and for transportation or service taking place on or after the date that is 1 year following such date of enactment, a person must begin such a civil action within 18 months after the claim accrues.* If that claim is against a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title and an election to file a complaint with the Commission is made and an election to file a complaint with the Commission is made under section 11705(c)(1), the complaint must be filed within 3 years after the claim accrues.

(c) * * *

(d) The [3-year period] *limitations period* under subsection (b) of this section is extended for 6 months from the time written notice is given to the claimant by the carrier of disallowance of any part of the claim specified in the notice if a written claim is given to the carrier within that [3-year period] *limitations period.* The [3-year period] *limitations period* under subsection (b) of this section and the 2-year period under subsection (c)(1) of this section are each extended for 90 days from the time the carrier begins a civil action

under subsection (a) of this section to recover charges related to the same transportation or service, or collects (without beginning a civil action under that subsection) the charge for that transportation or service if that action is begun or collection is made within the appropriate period.

(e) through (g) * * *

Section 11711 of That Chapter

**§ 11711. Dispute settlement program for household goods carriers**

(a) through (f) * * *

***§ 11712. Tariff reconciliation rules for motor common carriers of property***

*(a) Subject to Commission review and approval, motor carriers subject to the jursidiction of the Commission under subchapter II of chapter 105 of this title and shippers may resolve, by mutual consent, overcharge and undercharge claims resulting from billing errors or incorrect tariff provisions arising from the inadvertent failure to properly and timely file and maintain agreed upon rates, rules, or classifications in compliance with sections 10761 and 10762 of this title. Resolution of such claims among the parties shall not subject any party to the penalties of section 11901, 11902, 11903, 11904, or 11914 or this title.*

*(b) Nothing in this section shall relieve the motor carrier of the duty to file and adhere to its rates, rules, and classifications as required in sections 10761 and 10762, except as provided in subsection (a) of this section.*

*(c) The Commission shall, within 90 days after the date of enactment of this section, institute a proceeding to establish rules pursuant to which the tariff requirements of sections 10761 and 10762 of this title shall not apply under circumstances described in subsection (a) of this section.*

○